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## STATUTORY REGULATION OF ASSIGNMENTS FOR THE BENEFIT OF CREDITORS

AMONG creditors, the race is to the swift. The first to impress a lien upon the property of the debtor may satisfy his demand in full, to the exclusion of the less alert. While statutes have made consistent inroads upon this common-law doctrine, and the bankruptcy, assignment and recording acts evince an unmistakable public policy in favor of equality, the rule of the "race for diligence" stubbornly persists.<sup>1</sup> From the time that the first rumor of imminent insolvency is spread by the credit bureau, creditors are constantly jockeying for position. The harassed debtor may be persuaded to make over a chattel mortgage to a favored few, or to execute a deed in trust for preferred creditors, or to convey all or part of his assets in payment of a single debt. While the federal bankruptcy statute restores equality and

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1. The justice and desirability of the equality notion have recently been questioned. See Sturges, *A Proposed State Collection Act* (1934) 43 YALE L. J. 1055.

makes every such transfer by an insolvent debtor an act of bankruptcy, the filing of claims in the bankruptcy court is a costly and dilatory remedy for the unpreferred creditors. A creditor's bill for a receivership possesses similar disadvantages.

More prudent creditors have attempted to reach an amicable arrangement outside of court.<sup>2</sup> By persuading the debtor to execute a general assignment to a reputable, non-profit adjustment bureau,<sup>3</sup> creditors of a failing retail merchant frequently secure more than double the percentage of dividends that would trickle to them from bankruptcy.<sup>4</sup> Since a debtor is willing to attempt friendly adjustment long before he is resigned to the stigma of bankruptcy proceedings,<sup>5</sup> his estate generally is in a much more solvent condition than is usual when the wreckage of the business is finally dumped into the bankruptcy court.<sup>6</sup> Furthermore, the elimination of court costs and other expenses and the efficiency of the liquidating personnel have reduced the cost of administering an assignment to far below the toll exacted by the bankruptcy tribunal.<sup>7</sup> Occasionally, after an assignment to an adjustment bureau, creditors have been persuaded to agree to a composition permitting the bureau to operate the enterprise. The result quite frequently has been the elimination of management errors, payment of all debts, and the return of the business to the debtor as a solvent going concern.<sup>8</sup>

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2. See Sturges, *Commercial Arbitration or Court Application of Common Law Rules of Marketing?* (1925) 34 YALE L. J. 480; Billig, *Extra-Judicial Administration of Insolvent Estates: A Study of Recent Cases* (1930) 78 U. OF PA. L. REV. 293; Douglas and Marshall, *A Factual Study of Bankruptcy Administration and Some Suggestions* (1932) 32 COL. L. REV. 25, 42.

3. Of particular significance are the assignments conducted by the seventy-two adjustment bureaus affiliated with and supervised by the National Association of Credit Men. Each bureau is a non-profit making, incorporated unit in charge of a manager and manned by heavily bonded, salaried employees who are specialists in the field of liquidating insolvent estates and rehabilitating embarrassed debtors. Billig, *What Price Bankruptcy: A Plea for "Friendly Adjustment"* (1929) 14 CORN. L. Q. 413.

4. In 1930, some \$20,000,000 of assets were realized in friendly adjustment, out of liabilities totaling \$57,000,000. During the same year, \$42,600,000 was received by creditors from bankruptcy proceedings, in which liabilities totaled \$293,000,000. STRENGTHENING OF PROCEDURE IN THE JUDICIAL SYSTEM, SEN. DOC. NO. 65, 72d Cong., 1st Sess. (1932) (report of the Attorney General on Bankruptcy Law and Practice) at 186, hereinafter cited as STRENGTHENING OF PROCEDURE.

5. Debtors generally feel that there is less of a stigma attached to an assignment than to bankruptcy proceedings, and that afterwards a new business venture may more successfully be launched. DONOVAN, *ADMINISTRATION OF BANKRUPT ESTATES* (1931) 153.

6. Fürth, *The Critical Period Before Bankruptcy* (1932) 41 YALE L. J. 853; Comment (1937) 46 YALE L. J. 1177, 1179, 1187.

7. Billig, *supra* note 2. This study analyzes forty contemporaneous liquidations of small Pittsburgh and Cleveland retail stores with almost identical schedules of assets and liabilities. Half were liquidated by means of assignments to adjustment bureaus, while the others went through bankruptcy. The assignment cases were conducted at less than half the cost of the bankruptcy proceedings.

8. See Comment (1937) 46 YALE L. J. 1177, 1187. See p. 949 *infra*.

Although assignments for the benefit of creditors are regulated by comprehensive legislation in thirty-six states, in only a handful of jurisdictions do the directors of friendly adjustment bureaus make any attempt to comply with the statutes.<sup>9</sup> The state enactments, for the most part of Civil War vintage, offer a burdensome and expensive procedure. Observance of the detailed statutory requirements would forfeit the out-of-court atmosphere which is apparently the chief merit of the friendly adjustment system.<sup>10</sup> Nor do the statutes generally compensate for the disadvantages of compliance by dissipating the weaknesses inherent in the common law assignment. Since the debtor may defy creditors and select his own assignee, the door to fraud is open. Without legislative reinforcement, the assignee's powers are strictly limited. He cannot bring suit to set aside fraudulent conveyances made by the assignor,<sup>11</sup> nor can he destroy preferences obtained prior to the assignment.<sup>12</sup> Furthermore state legislation cannot grant the debtor a full discharge, nor can it prevent any assignment, if made while the debtor is insolvent, from being an act of bankruptcy. For four months thereafter, the assigned estate runs the danger of being cast into the bankruptcy court upon petition of three non-consenting creditors.<sup>13</sup>

Movements for legislative reform have recently sprung from two sources. Renovation of state assignment statutes has been effected during the past two years in Arizona, Virginia, West Virginia, and Wisconsin.<sup>14</sup> Meanwhile, some of the proposals for overhauling the National Bankruptcy Act have contemplated inclusion of assignments within the purview of federal regulation.<sup>15</sup> But while the advocates of friendly adjustment seek particular statutory advantages, they are afraid that either sort of new legislation will render the administration of an assignment too completely an in-court proceeding.<sup>16</sup> Closer regulation for the purpose of preventing fraud will, it is

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9. This and subsequent uncredited statements are based upon communications to the YALE LAW JOURNAL from forty-three adjustment bureaus located throughout the country, January 14-February 10, 1938.

Operative assignment statutes exist in all states except Connecticut, Idaho, Illinois, Louisiana, Maine, Maryland, Massachusetts, Nevada, New Hampshire, North Dakota, Oregon and Washington. In some of these jurisdictions, statutes are still on the books, but have been suspended by the local courts during the pendency of the National Bankruptcy Act.

10. STRENGTHENING OF PROCEDURE, *op. cit. supra* note 4, at 71.

11. See p. 956 *infra*.

12. See p. 957 *infra*.

13. Section 3(a) (5) of the National Bankruptcy Act, 30 STAT. 546 (1898), 44 STAT. 662 (1926), 11 U. S. C. § 21(a) (5) (1934).

14. ARIZ. REV. CODE ANN. (Courtright, Supp. 1935) § 176; VA. CODE ANN. (Michie, 1936) § 5278b; W. VA. CODE ANN. (Michie, 1937) § 3946; WIS. LAWS (1937) c. 431.

15. Particularly the Hastings-Michener Bill, S. 3866, 72d Cong., 1st Sess. (1932). See STRENGTHENING OF PROCEDURE, *op. cit. supra* note 4, at 68.

16. See *Joint Hearings before Subcommittees of the Committees on the Judiciary on S. 3866*, 72d Cong., 1st Sess. (1932) 729.

feared, inevitably make honest adjustments slower and more costly. In discussing the dilemma faced by the legislators, this comment will examine the effectiveness of present law in assisting honest assignments and forestalling fraudulent ones, as a basis for considering what statutory changes are desirable, and whether they should be effectuated by national or local regulation.

### EXECUTION OF THE ASSIGNMENT

A general assignment freezes the rights of the parties as effectively as other insolvency proceedings; individual creditors are prevented from levying upon the assets transferred.<sup>17</sup> A debtor has an inherent common law right to execute an assignment,<sup>18</sup> independent of statute and without the consent of creditors.<sup>19</sup> Upon execution and delivery of the instrument to the assignee, traditionally a trust is created. Since the assignment is rarely of property disproportionately greater in value than the pre-existing debts thereby secured, no one can attack the instrument as a fraudulent conveyance.<sup>20</sup> In Massachusetts, however, a series of early nineteenth century decisions, based upon the absence of "equity powers" in the state courts at that time, held that an assignment, being equitable in nature, could not operate to defeat a subsequent common law writ of attachment brought by a non-consenting creditor.<sup>21</sup> Several other courts, unhampered by any absence of equity jurisdiction, have mistakenly adopted the Massachusetts rule, and upon attack by a dissenting creditor, declare the assignment wholly void and permit the assailant to recover in full.<sup>22</sup> In some of these states the rigor of this rule has been eased; creditors are conclusively presumed to

17. *GLENN, LIQUIDATION* (1935) § 110. But *cf.* *Fidelity-Philadelphia Trust Co. v. Philadelphia Girard Nat. Bank*, 33 F. (2d) 649 (C. C. A. 3d, 1929).

18. *Brashear v. West*, 7 Pet. 603 (U. S. 1833).

19. *Brainard v. Fitzgerald*, 3 Cal. (2d) 157, 44 P. (2d) 336 (1935); *Damaskus v. McCarty Johnson Heating Co.*, 88 Colo. 279, 295 Pac. 490 (1931); *Brockton Shoe Mfg. Co. v. Schenkman*, 146 Misc. 119, 261 N. Y. Supp. 740 (1932); *Utah Ass'n of Credit Men v. McConnell*, 50 Utah 531, 167 Pac. 817 (1917); *Mayfield Woolen Mills v. Goodrich & Martineau Co.*, 189 Wis. 406, 207 N. W. 954 (1926).

20. See § 3 of the UNIFORM FRAUDULENT CONVEYANCE ACT. The assignment cannot be destroyed unless made with actual intent to defraud (§ 7), or unless no fair consideration has been given. Security for a pre-existing debt is declared fair consideration (§ 3).

21. *Widgery v. Haskell*, 5 Mass. 144 (1809); *Stevens v. Bell*, 6 Mass. 333 (1810); 29 HARV. L. REV. 449 (1910). In England, the assignment is ineffective until at least one creditor accepts. *Garrard v. Lauderdale*, 3 Sim. 1 (Ch. 1830).

22. *Roesch and Sons v. Mumford*, 230 Fed. 56 (C. C. A. 3d, 1916); *In re Hall*, 25 F. (2d) 518 (W. D. Pa. 1928); *Lubinsky v. Hoffman*, 158 Misc. 261, 234 N. Y. Supp. 549 (Sup. Ct. 1934), *aff'd*, 246 App. Div. 803, 285 N. Y. Supp. 1074 (1st Dep't 1936). In Massachusetts, the trust is declared valid at least to a sum equal to the claims of assenting creditors. A dissenter may attach only the balance. *Dunham Bros. v. Gordon*, 239 Mass. 502, 194 N. E. 675 (1935).

have assented to statutory assignments.<sup>23</sup> But even in these jurisdictions, should the instrument fail to accord exactly with the details required by the legislature, the assignment can be destroyed by any non-consenting creditor.<sup>24</sup>

Statutory regulation has afforded another ground for attacking friendly adjustments, for apart from the issue of consent, there are recurring provisions that all assignments must comply in all particulars with the assignment statute—if not, the instrument is void.<sup>25</sup> The laws commonly require recording of the assignment, a complete inventory, a schedule of debts, and the posting of a bond by the assignee. Notice of the assignment must be mailed to all creditors. Fraudulent or preferential conveyances to collusive assignees are thus discouraged, but since the estate can be liquidated more cheaply without filing under the statute and thus becoming subject to other cumbersome provisions,<sup>26</sup> many honest assignments to adjustment bureaus are also endangered by the invalidating clause. But because invalidation shuts out most creditors by permitting the attacker to recover in full,<sup>27</sup> many courts, squeezing through almost imperceptible loopholes in the statute,<sup>28</sup> have upheld non-complying but honest assignments against all attack,<sup>29</sup> and have compromised in cases of actual fraud by turning the estate over to a receiver for equal distribution among all claimants.<sup>30</sup> Such decisions rely upon the familiar rationale that the statute is not mandatory, but directory. Wisconsin seems to have solved the problem in more direct fashion by providing that no assignment is to be declared void for failure to observe statutory

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23. Cf. IOWA CODE (1935) § 1270; MONTANA REV. CODES ANN. (Anderson & McFarland, 1935) § 8612. See *Eicher v. Baird*, 204 Iowa 188, 215 N. W. 236 (1927).

24. See cases cited *supra* note 22.

25. ARIZ. REV. CODE ANN. (Courtright, Supp. 1935) § 176; CAL. CIV. CODE (Deering, 1933) § 3451; MICH. COMP. LAWS (1929) § 15352; NEB. COMP. STAT. (1929) § 6-101; N. J. COMP. STAT. (1937) § 2:34-5; OKLA. STAT. (Harlow, 1931) § 10029; S. D. COMP. LAWS (1929) § 2049; VT. PUB. LAWS (1933) § 2555; VA. CODE ANN. (Michie, 1936) § 5278b; W. VA. CODE ANN. (Michie, 1937) § 3946.

26. See note 9, *supra*, pp. 954, 958, 959, *infra*.

27. *Williams v. Banana Dist. Co.*, 59 F. (2d) 645 (C. C. A. 6th, 1932); *Haverhill Shoe Novelty Co. v. Leader Shoe Co.*, 87 N. H. 366, 180 Atl. 242 (1935). See note 44, *infra*.

28. For a particularly strained construction based on ingenious refinements, see *Brainard v. Fitzgerald*, 3 Cal. (2d) 157, 44 P. (2d) 336 (1935). The result of the case, however, is not to be criticized.

29. Failure to record: *Hopfan v. Knauth*, 156 Misc. 545, 282 N. Y. Supp. 219 (Mun. Ct. 1935); *In re Freeman*, 35 F. (2d) 952 (C. C. A. 5th, 1929). Assignee not a resident: *Brown Shoe Co. v. Shor*, 56 S. W. (2d) 466 (Tex. Civ. App. 1933). Failure to file bond: *Pobreslo v. Boyd*, 210 Wis. 20, 242 N. W. 725 (1932); *Wasserman v. Raynor's Fur Corp.*, 137 Misc. 872, 244 N. Y. Supp. 110 (City Ct., 1930); *In re Freeman*, *supra*. Failure to give notice to creditors: *Isaacson v. Davis*, 127 Me. 398, 143 Atl. 788 (1928). Failure to file schedule of creditors: *Bertenshaw v. Klag*, 117 Kan. 176, 231 Pac. 73 (1924). Failure to annex inventory: *Pobreslo v. Boyd*, *supra*; *Newman v. Clement*, 70 S. W. (2d) 789 (Tex. Civ. App. 1934).

30. *Murray Bros. v. Mackinac Circuit Judge*, 241 Mich. 312, 216 N. W. 914 (1928). But cf. *Williams v. Banana Dist. Co.*, 59 F. (2d) 645 (C. C. A. 6th, 1932).

requirements; instead, the assignee, upon petition of any creditor, can be compelled to comply with the terms of the law.<sup>31</sup>

An assignment which provides for an extension and continuation of the business runs the danger of further attack. When the instrument is executed, debtor and creditors may both have hopes of a subsequent composition through which liabilities will be scaled down and the enterprise continued. Many states therefore allow the assignee to terminate the assignment whenever an accord has been reached.<sup>32</sup> But assignments which contemplate an extended period of creditor management are hampered by the common law notion that a provision in the assignment deed authorizing the assignee to continue the business is illegal as tending to delay and defraud creditors.<sup>33</sup> This doctrine has been expressly codified in four states.<sup>34</sup> While five jurisdictions have revamped their laws to permit continued operation of the enterprise,<sup>35</sup> efforts at composition by means of an assignment in other jurisdictions must be abandoned if the assent of all creditors cannot immediately be obtained. Consents are not impossible to marshal, for adjustment bureaus have had substantial success in reorganizing small businesses through assignments to which all creditors have agreed.<sup>36</sup> Statutory prohibition of an extension clause is then unimportant, for there is no one who can attack the assignment deed.

No assignment is completely immune from attack until four months after its execution, for until that time three non-consenting creditors may throw the estate into bankruptcy.<sup>37</sup> Although it might be expected that friendly adjustment would receive a tremendous impetus through abolition of the "four-months" provision, the advisability of outright repeal seems dubious.

31. Wis. Laws (1937) c. 431, § 128:02(2). Cf. PA. STAT. ANN. (Purdon, 1930) tit. 39, § 40. The court reached a similar result without statutory aid in *Bertenshaw v. Klag*, 117 Kan. 176, 231 Pac. 73 (1924). But cf. *Bernstein v. Raff*, 140 Misc. 353, 250 N. Y. Supp. 694 (Sup. Ct. 1931).

32. See, e.g., Ky. STAT. (Carroll, 1936) § 95; N. J. REV. STAT. (1937) § 2:34-22; N. Y. DEBTOR & CREDITOR LAW, art. 2, § 15(14).

33. *Home Savings & Loan Ass'n v. Schmidt*, 273 N. W. 497 (Neb. 1937); *Roberts Co. v. Hopkins, Inc.*, 6 N. E. (2d) 837 (Mass. 1937). The cases are collected in (1921) 23 A. L. R. 199. But the business may apparently be continued under a trust mortgage which preserves to the debtor an equity of redemption. *Samuels v. Charles E. Fogg Co.*, 258 Mass. 402, 155 N. E. 429 (1927). And a brief continuation for conservation purposes, in order to effect a better liquidation, is unobjectionable. *Rodgers v. Boise Ass'n of Credit Men*, 33 Idaho 513, 196 Pac. 213 (1921).

34. CAL. CIV. CODE (Deering, 1937) § 3457; ORELA. STAT. (Harlow, 1931) § 10029; S. D. COMP. LAWS (1929) § 2048; UTAH REV. STAT. ANN. (1933) § 5-0-2.

35. Permission of the court is always required. MONT. REV. CODES ANN. (Anderson & McFarland, 1935) § 8635; N. J. REV. STAT. (1937) § 2:34-15; N. Y. DEBTOR & CREDITOR LAW § 15(2); OHIO GEN. CODE ANN. (Page, 1926) § 11125; W. VA. CODE ANN. (Michie, 1937) § 3946(13).

36. See Comment (1937) 46 YALE L. J. 1177, 1187.

37. Section 3a. 30 STAT. 546 (1898), 44 STAT. 662 (1926), 11 U. S. C. § 21(a) (1934).

Adjustment bureaus report that the estates which they administer are very rarely tossed into bankruptcy by recalcitrant minorities.<sup>38</sup> On the other hand, the bureaus themselves quite often recommend that petitions be filed against debtors who have transferred their property to assignees of doubtful fidelity to creditors. The threat of bankruptcy is the most powerful weapon creditors possess when it becomes necessary to forestall a fraudulent assignor. The loss occasioned when honest assignments are unfortunately put into the bankruptcy court is probably overbalanced by the number of dishonest transfers trapped by the same provision.

It would, however, be possible to emasculate the power of strike creditors against an honest assignee, and still retain positive control over fraudulent assignments. Instead of permitting three creditors with claims totalling \$500 to file a petition, the federal act could be amended to require application by a majority of creditors in number or amount, or some showing of fraud, before the debtor could be adjudged an involuntary bankrupt upon a general assignment for creditors.<sup>39</sup> The proposed Chandler Bill for renovating the bankruptcy act definitely steps in this direction by setting up a procedure permitting escape from the four-months provision when a majority of creditors have agreed to a composition, the terms of which are approved by the bankruptcy court.<sup>40</sup> If majority rule were also applied by federal mandate to liquidation assignments, the heyday of the nuisance creditor would be over.

The debtor's power to immunize his assets by way of assignment carries with it one disadvantage, not present in bankruptcy or receivership, which has necessitated further statutory control. At common law, the debtor possessed a second inherent right—the privilege to prefer creditors.<sup>41</sup> Georgia and a few states have codified this common-law rule and either expressly or by necessary implication permit priorities in an assignment.<sup>42</sup> But most legislatures, persuaded that the assignor's power to immunize his assets should not be abused by allowing him to single out particular beneficiaries, have expressly prohibited general assignments which include preferences. Several of these statutes declare the whole assignment absolutely void.<sup>43</sup> The preferred creditors are thus deprived of their advantage, only to have the priority bestowed upon the first unpreferred claimant alert enough to attack

38. See note 9, *supra*.

39. Cf. Comment (1937) 46 YALE L. J. 1177, 1189; *Joint Hearings before Subcommittees of the Committees on the Judiciary on S. 3866*, 72d Cong., 1st Sess. (1932) 702.

40. See Comment (1937) 46 YALE L. J. 1177, 1188.

41. *McMullin v. Keogh-Doyle Meat Co.*, 96 Colo. 298, 42 P. (2d) 463 (1934).

42. GA. CODE (1933) § 28-301; MONT. REV. CODES ANN. (Anderson & McFarland, 1935) §§ 8617, 8620; UTAH REV. STAT. ANN. (1933) § 5-0-20. Compare § 3451 of CAL. CIV. CODE (Deering, 1937) with § 3457. In addition, a few statutes (Ark., Miss., and R. I.) make no mention of preferences, while twelve states have no assignment laws in effect at all. Thus preferential assignments may still be valid in at least eighteen states.

43. DEL. REV. CODE (1935) § 5282; FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) § 6752; N. J. REV. STAT. (1937) § 2:34-1; S. C. CODE (1932) § 9106.

the instrument and levy upon the property.<sup>44</sup> Other acts include a much sounder provision: the preference itself is destroyed, but the rest of the assignment is salvaged and administered by the court as a trust for all creditors.<sup>45</sup> Since such regulation cannot harm honest adjustments, a similar amendment should doubtless be adopted in all jurisdictions.

Lawyers have devised several methods of evading the prohibition of preferences in general assignments. Instead of executing an assignment, an insolvent may safely make over to named creditors a mortgage, which, although an act of bankruptcy,<sup>46</sup> cannot usually be converted by other claimants into a general assignment for creditors.<sup>47</sup> In only a few states is the preference forestalled by laws permitting other creditors to attack the conveyance and transform it into a common trust fund.<sup>48</sup> In such jurisdictions, a mortgage,<sup>49</sup> payment of a debt,<sup>50</sup> an outright transfer of property,<sup>51</sup> and a change of beneficiary under a life insurance policy<sup>52</sup> have each been held to operate as a general assignment. But should the lien be for a new consideration, and not merely to secure an antecedent debt, the transfer is good, at least to the extent of the new consideration, against all the world.<sup>53</sup>

44. *Virginia Trust Co. v. Pharr Estates, Inc.*, 206 N. C. 894, 175 S. E. 186 (1934); *Jarvis v. Webber*, 196 Cal. 86, 236 Pac. 138 (1925).

45. ALA. CODE ANN. (Michie, 1928) § 8040; ARK. DIG. STAT. (Crawford & Moses, 1919) § 489; KAN. GEN. STAT. ANN. (1935) c. 60, § 1301; KY. STAT. (Carroll, 1936) § 74; MO. STAT. ANN. (Vernon, 1932) § 5269; OKLA. STAT. (Harlow, 1931) § 10026, but see *Minshall v. Sanders*, 175 Okla. 1, 51 P. (2d) 940 (1936); PA. STAT. ANN. (Purdon, 1930) tit. 39 § 1; TENN. CODE ANN. (Williams, 1934) § 7787; TEX. ANN. REV. CIV. STAT. (Vernon, 1925) art. 261; VA. CODE ANN. (Michie, 1936) § 5278b.

46. Section 3(a) (2) of the National Bankruptcy Act, 30 STAT. 546 (1893), 44 STAT. 662 (1926), 11 U. S. C. § 21(a) (2) (1934).

47. *Metzler v. Foster Holding Co.*, 5 Cal. (2d) 278, 54 P. (2d) 447 (1936); *Royal Palm Cemetery Co. v. Smith*, 117 Fla. 255, 157 So. 495 (1934); *Nelson v. Poss*, 172 Minn. 149, 214 N. W. 787 (1927); *Stirling v. Logue*, 154 Miss. 812, 123 So. 825 (1929); *Phillips v. Phillips*, 53 N. D. 66, 204 N. W. 985 (1925); *James v. Lederer-Strauss & Co.*, 32 Wyo. 377, 233 Pac. 137 (1925).

48. ALA. CODE ANN. (Michie, 1928) § 8040; KY. STAT. (Carroll, 1936) § 1910; N. C. CODE ANN. (Michie, 1935) § 1609. Cf. PA. STAT. ANN. (Purdon, 1930) tit. 39 § 2.

49. *Mainous v. Brown Shoe Co.*, 222 Ky. 25, 299 S. W. 1063 (1927); *State Bank of Stearns v. Stephens*, 265 Ky. 615, 97 S. W. (2d) 553 (1936). Cf. *Cowan v. Dale*, 189 N. C. 684, 128 S. E. 155 (1925). In *Farmer's Banking & Trust Co. v. Tarboro Co.*, 188 N. C. 177, 124 S. E. 155 (1924) the court arrived at the anomalous conclusion that a chattel mortgage could be converted into an assignment, but was invalid in any case since it did not comply with the details of the assignment statute. This result is criticized in Comment (1937) 15 N. C. L. Rev. 267.

50. *May v. Mathers*, 233 Ala. 654, 172 So. 907 (1937).

51. *Huff v. Russell*, 267 Ky. 515, 102 S. W. (2d) 984 (1937); *Katz v. Earl & John Scott*, 229 Ky. 738, 17 S. W. (2d) 1024 (1929).

52. *In re Huff's Estate*, 299 Pa. 200, 149 Atl. 179 (1930).

53. *Commissioner of Banks v. Turnage*, 202 N. C. 485, 163 S. E. 451 (1932). Cf. Bankruptcy Act, Section 67 (d), 30 STAT. 564 (1893), 36 STAT. 842 (1910), 11 U. S. C. § 107(d) (1934).



Since the statutes have been interpreted as not applying to assignments of but a portion of a debtor's property, preferences may also be effected by a series of partial assignments.<sup>54</sup> Unless the partial transfers are too close together in time,<sup>55</sup> the court will not regard them as subterfuge, nor will it convert all the conveyances into one trust for creditors.<sup>56</sup> Statutory control of such transfers has been secured by providing that every assignment, however expressed, be construed to operate upon all of the debtor's non-exempt property.<sup>57</sup>

#### ADMINISTRATION OF THE ESTATE

*The Assignee.* Crucial to the success of the assignment is the selection of a competent liquidator. An assignee of doubtful fidelity to creditors may be lax in allowing questionable claims, in collecting assets, and in setting aside prior fraudulent conveyances made by the debtor. He may procrastinate, both to get the estate safely past the four-month bar to bankruptcy proceedings, and to build up sizeable fees for himself. In the traditional conception of an assignment, however, the debtor creates a trust for creditors and as settlor, nominates his own trustee. While in many cases, the assignor is persuaded to assign to a responsible adjustment bureau, he often prefers to choose an attorney, relative or preferred claimant. Despite the insolvent's obvious opportunity to jeopardize the interests of all creditors by a fraudulent assignment to a friendly assignee, statutory reform has been slow.

Regulatory legislation has been of three types. The new West Virginia statute establishes minimum qualifications for the assignee, forbidding an assignment to the debtor's relative, creditor, attorney, agent or employee.<sup>58</sup> Several states go further and forbid the assignor any voice in the selection of the liquidator. California and Nebraska provide that the assignment shall be made in the first instance to the sheriff of the county, whose duty it shall be to call a conference of creditors. At the meeting, a majority of the claimants in number and amount elect a trustee, and the sheriff turns the estate over to him.<sup>59</sup> In South Carolina, the debtor is free to select his own assignee, but creditors may meet and select an agent of their own to administer the property side by side with the representative of the debtor. The concurrence of both delegates is made a prerequisite to any action toward liquidation.<sup>60</sup>

54. *Jacobson v. Newman*, 254 Mich. 555, 236 N. W. 861 (1931); *Smith v. Allen*, 144 Ore. 261, 24 P. (2d) 1043 (1933); *Orloff v. Pester*, 143 Misc. 685, 257 N. Y. Supp. 111 (Sup. Ct. 1933); *Radford v. Ewing*, 66 S. W. (2d) 344 (Tex. Civ. App. 1933).

55. *Cf. Peed v. Elliott*, 134 Ind. 536, 34 N. E. 319 (1893).

56. *Dadeville Oil Co. v. Hicks*, 184 Ala. 367, 63 So. 970 (1913). See cases cited *supra* note 54.

57. NEB. COMP. STAT. (1929) § 6-102; PA. STAT. ANN. (Purdon, 1930) tit. 39 § 2; TEX. ANN. REV. CIV. STAT. (Vernon, 1925) art. 261. See *Pennsylvania Trust Co. v. Billman*, 61 F. (2d) 382 (C. C. A. 3rd, 1932).

58. W. VA. CODE ANN. (Michie, 1937) § 3946 (12).

59. CAL. CIV. CODE (Deering, 1937) § 3449; NEB. COMP. STAT. (1929) § 6-105, 110.

60. S. C. CODE (1932) § 9097.

Under a third legislative system, the debtor is permitted to select his own assignee, but the creditors are given greater powers of removal. In the absence of statute, a creditor is limited to the usual remedy of a *cestui que trust*: he can, if he alleges specific wrongful acts,<sup>61</sup> petition in equity for removal of the assignee. But since speed is paramount in liquidation, the trial delay incident to such a procedure ordinarily would be fatal. Although nothing can be done to lessen the difficulty of proving mismanagement, a dozen legislatures have emancipated creditors from the rules applicable to ordinary trust beneficiaries. In some of these states, a majority of creditors in number and amount may remove the assignee for any reason, and petition the court to appoint another.<sup>62</sup> Other laws go even further and permit creditors to select the new assignee themselves.<sup>63</sup>

One weakness runs through these methods of creditor election and removal. It is not improbable that many fictitious claims will be included in the schedule annexed to the assignment, especially when the debtor's record is so poor that creditors insist upon selecting their own liquidator. Trumped-up debts to relatives and obligations inflated in order to prefer creditors must be eliminated before any effective election can be held, for otherwise the debtor may be able to control a majority of claims in number and amount, and put his own nominee in office. Before an assignee can be selected to administer the estate it may be necessary to hold lengthy court hearings for the purpose of weeding out fraudulent debts.

This dilatory process might be obviated by permitting the sheriff, clerk or judge to make summary allowance and disallowance of all claims for the single purpose of selecting an assignee. No appeal would be permitted, but the determinations would not be of any weight when the claims were later more fully examined for purposes of distribution. Yet the success of any method of creditor selection is dubious. Similar elections in bankruptcy practice have been plagued by unscrupulous proxy-seekers and fee-chasing attorneys.<sup>64</sup> Moreover, unless the debtor and most creditors have come to an amicable understanding, the efficiency of the assignment method will be so far diminished that it would be preferable to invoke bankruptcy proceedings, where fraud can be more readily uncovered.

In addition to their powers of election and removal, creditors in all but five states<sup>65</sup> are protected by a statutory requirement that the assignee shall

61. *Enterprise Fixture Co. v. Lieberman*, 240 App. Div. 214, 269 N. Y. Supp. 219 (1st Dep't 1934).

62. ALA. CODE ANN. (Michie, 1928) § 10412; COLO. COMP. LAWS (1921) § 6253; N. C. CODE ANN. (Michie, 1935) § 1614; UTAH REV. STAT. ANN. (1933) § 5-0-17.

63. IOWA CODE (1935) § 12745; KAN. GEN. STAT. ANN. (1935) § 60-1344; N. J. REV. STAT. (1937) § 2:34-41; OHIO GEN. CODE ANN. (Page, 1926) § 11096; VA. CODE ANN. (Michie, 1936) § 5278c; W. VA. CODE ANN. (Michie, 1937) § 3946(8).

64. See Comment (1937) 46 YALE L. J. 1177, 1198.

65. In Georgia and Rhode Island, an accounting is not required by the statute. California and Vermont demand an accounting to the court only on petition of a creditor.

account to the court for all receipts and disbursements. A referee appointed for this purpose conducts a detailed examination, takes testimony, and certifies a complete record of his findings to the court,<sup>66</sup> which usually confirms the report in a summary fashion. But the expense and delay of this process is unfortunately great.<sup>67</sup> Although the referee is limited to a fixed percentage-fee plus his expenses, the latter item can be made very lucrative by long hearings and voluminous records. Moreover, a referee often suggests the waiver of statutory fees, and the parties are obliged to consent rather than incur his rancor and risk additional obstruction. It is because the money and time consumed by a compulsory accounting often eat away a substantial portion of the assets, that friendly adjustment by way of an assignment has almost invariably taken place outside the statute.

While some of the expense could be eliminated by abolishing the fee plan for referees and establishing a salary system instead,<sup>68</sup> it is doubtful whether creditors derive sufficient advantage out of any compulsory accounting to compensate for its inefficiency. The requirement is obviously superfluous when the assignee is one of the reputable, non-profit adjustment bureaus which have been permitted by creditors to liquidate \$20,000,000 of assets a year, without benefit of court supervision.<sup>69</sup> And creditors seem to have sufficient control over less trustworthy assignees through their powers of removing the trustee and of placing the estate in bankruptcy. Should their confidence be misplaced, additional remedies are available. If any default has been committed, the surety on the assignee's bond may be held.<sup>70</sup> And since any assignee, common law or statutory, is a trustee and therefore subject to the jurisdiction of equity, a dissatisfied creditor may bring suit as a *cestui* to force an accounting before the equity tribunal.<sup>71</sup> As long as credi-

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CAL. CIV. CODE (Deering, 1937) § 3469; VT. PUB. LAWS (1934) § 2557. In Colorado, court review may be waived with the signed consent of all creditors. COLO. COMP. LAWS (1921) § 6266. It must also be remembered that twelve states have no operative assignment statutes at all.

66. See, *e.g.*, N. Y. DEBTOR & CREDITOR LAW, art 2, § 15 (11). In courts with a smaller amount of business, the services of the referee are often dispensed with.

67. See STRENGTHENING OF PROCEDURE, *op. cit. supra* note 4, at 71.

68. *Cf.* Comment (1937) 46 YALE L. J. 1177, 1189.

69. STRENGTHENING OF PROCEDURE, *op. cit. supra* note 4, at 68.

70. If the assignee is in default, recovery may be had against him [Wilkins v. Barnes, 110 Conn. 379, 148 Atl. 132 (1930)] and the surety on his bond [Neely v. Cairo City Nat. Bank, 150 Ky. 512, 150 S. W. 679 (1912)] to the same extent as against any other trustee. He is liable for administrative expenses [Keystone Pipe Co. v. Zweifel, 127 Tex. 392, 94 S. W. (2d) 412 (1936)], fraud and failure to exercise reasonable diligence and good faith in accomplishing the purposes of the trust. Champion v. Commonwealth, 228 Ky. 794, 15 S. W. (2d) 1003 (1929); *In re Stone's Assignment*, 220 Iowa 1341, 264 N. W. 604 (1936).

71. Farmers & Merchants Nat. Bank v. Peterson, 5 Cal. (2d) 601, 55 P. (2d) 867 (1936); *In re Wheeler's Estate*, 287 Pa. 416, 135 Atl. 252 (1926); First Nat. Bank v. Bell, 125 Ore. 598, 268 Pac. 63 (1928); Pennsylvania Trust Co. v. Billman, 61 F. (2d) 382 (C. C. A. 3rd, 1932).

tors possess the right to equitable relief when desired, compulsory accounting, with its attendant expense, seems unnecessary.

Of course, without mandatory and painstaking investigation, occasional defaults may go undetected. It nevertheless seems practical to wink at the probably small loss caused by the fraud of an unsuspected assignee, when dividends in the great majority of honest assignments will be so greatly increased by the abolition of compulsory accounting. Perhaps the best way of solving the problem would be to require the assignee to send a detailed summary of his stewardship to all participating creditors, together with a notice of his application for a discharge. Then, unless within a brief period a creditor filed a motion for a court hearing,<sup>72</sup> and posted a bond, the judge or clerk would terminate the trust, and set the assignee's fee in the manner prescribed by statute.

While most states require the judge to allow a "reasonable compensation" for the assignee,<sup>73</sup> others more judiciously set a fixed percentage limit of from five to ten percent of the liquidated asset value.<sup>74</sup> The result of the latter method should be to force prospective assignees to select their risks, and reject those estates which are so dissipated that adequate compensation cannot be obtained. A ten percent fee, the charge usually made by a competent, non-profit adjustment bureau,<sup>75</sup> does not seem exorbitant, especially if the superfluous toll exacted by the referee could be eliminated by doing away with a mandatory accounting.

An accounting cannot be dispensed with when, within four months of the assignment, the assignor is put into bankruptcy, and the assignee is compelled to transfer the estate to the receiver or trustee. Since the occasion for bankruptcy is usually lack of confidence in the assignee, a strict investigation into all of his activities is essential.<sup>76</sup> Several district judges have minimized the cost of the examination by denying the assignee any compensation when irregularities are found in his conduct.<sup>77</sup> It has also been suggested that the bankruptcy act be amended to permit the trustee in bankruptcy to recover directly from the assignee all disbursements made

72. Cf. CAL. CIV. CODE (Deering, 1937) § 3469; VT. PUB. LAWS (1934) § 2557.

73. See, e.g., KAN. GEN. STAT. ANN. (1935) § 60-1346.

74. See, e.g., ARK. DIG. STAT. (Crawford & Moses, 1919) § 493 (10%); N. Y. DEBTOR & CREDITOR LAW, art 2 § 21 (5%); W. VA. CODE ANN. (1937) § 3946(16) (5%).

75. Billig, *op. cit. supra* note 2, at 310.

76. See Hagar, *General Assignments and the Bankruptcy Law* (1917) 27 YALE L. J. 210, 216. State court approval of an assignee's account does not eliminate the necessity of an auditing by the federal tribunal, should bankruptcy intervene. *Matter of Neuberger, Inc.*, 233 Fed. 701 (S. D. N. Y. 1916), *aff'd*, 240 Fed. 947 (C. C. A. 2d, 1917).

77. *In re Polansky*, 41 F. (2d) 547 (S. D. N. Y., 1930). See also Hagar, *supra* note 76, at 218.

A suspected assignee is rarely permitted to continue as trustee in bankruptcy. See STRENGTHENING OF PROCEDURE, *op. cit. supra* note 4, at 73, 74; Comment (1937) 46 YALE L. J. 1177, 1186, n. 50.

by the latter which the court does not approve.<sup>78</sup> At present, such action can be taken only by a cumbersome plenary suit.<sup>79</sup>

*Realization on Assets.* Even when a competent liquidator has been selected, his powers may be inadequate to enable him to administer the estate efficiently. Considerable difficulty may be encountered in recovering assets that have been disposed of before the execution of the assignment. While any creditor may sue to recover property which a fraudulent assignor has concealed or transferred to others,<sup>80</sup> the power to sue is usually denied to the common law assignee. He cannot regain secreted assets unless they are expressly mentioned in the assignment deed from which he derives his authority.<sup>81</sup> Nor can an assignee for creditors set aside a fraudulent transfer by a suit against the transferee, for the rights of any assignee against a third party are traditionally subject to all defenses which the third party has against the assignor.<sup>82</sup> Similarly, although creditors may overcome an unrecorded mortgage, the assignee is helpless.<sup>83</sup> While it is always possible that a single creditor may bring a bill in equity to restore the fraudulent conveyance to the general estate, a claimant alert enough to take such action would usually prefer to levy at law upon the property and retain as much as is necessary to satisfy his claim in full.<sup>84</sup>

Fifteen states<sup>85</sup> therefore confer authority upon a statutory assignee to regain any transferred or secreted assets which a creditor would be able to recover.<sup>86</sup> Even if the fraudulently transferred assets already have been

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78. STRENGTHENING OF PROCEDURE, *op. cit. supra* note 4, at 75, 76.

79. *In re Jack Stolkin*, 42 F. (2d) 829 (C. C. A. 2d, 1930).

80. UNIFORM FRAUDULENT CONVEYANCE ACT, §§ 9, 10.

81. The assignee's title and powers are strictly delimited by the terms of the assignment instrument. *Seibert v. Milligan*, 110 Ind. 106, 10 N. E. 929 (1887).

82. *Moore v. Schneider*, 196 Cal. 380, 238 Pac. 81 (1925); Comment (1936) 45 YALE L. J. 504, 509. *Contra*: *Seattle Ass'n of Credit Men v. General Motors Acceptance Corp.*, 188 Wash. 635, 63 P. (2d) 359 (1936). The Washington court has been very liberal in its interpretation of the common law assignment, implementing the common-law assignee with most of the powers possessed by a trustee in bankruptcy.

83. *Beard v. Herndon*, 84 Okla. 142, 203 Pac. 226 (1921). *Contra*: *McMinn v. Harrison*, 93 Colo. 5, 23 P. (2d) 944 (1933), (1933) 47 HARV. L. REV. 346. See Comments (1936) 45 YALE L. J. 504, (1933) 6 ROCKY MT. L. REV. 70.

84. A creditor has this power under § 9 of the UNIFORM FRAUDULENT CONVEYANCE ACT.

85. ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 184; GA. CODE ANN. (Michie, 1926) § 28-313; KY. STAT. (Carroll, 1936) § 84; MINN. STAT. (Mason, 1927) § 9788; NEB. COMP. STAT. (1929) § 6-130 (if two-thirds of creditors consent); N. J. REV. STAT. (1937) § 2:34-15; N. Y. DEBTOR & CREDITOR LAW, art. 2, § 15-6 (if court permits); N. C. CODE ANN. (Michie, 1935) § 1611; OHIO GEN. CODE ANN. (Page, 1926) § 11106; PA. STAT. (Purdon, 1930) tit. 39 § 71; S. C. CODE (1932) § 9107; TENN. CODE ANN. (Williams, 1934) § 7788; TEX. ANN. REV. CIV. STAT. (Vernon, 1925) art. 268; W. VA. CODE ANN. (Michie, 1937) § 3946(13); WIS. LAWS (1937) c. 431 § 128:19-2.

86. There is some dispute whether or not the statutory authority gives the assignee power to upset an unrecorded conditional sale. Compare *Seaboard Citizens' Nat. Bank of*

recovered by an individual creditor, the assignee may under the statute step in to recover the property and limit the levying creditor to a *pro rata* share.<sup>87</sup> If the assignee is lethargic, any *cestui* of the trust may conduct the suit to set aside the conveyance, provided he turns over the increment to the general estate.<sup>88</sup>

Statutory implementation should go further than permitting recovery of dishonest transfers and secretions after they are discovered. Before taking any action, the assignee must have more than mere suspicion of the fraud. Yet only a dozen states have progressed to the point of allowing examination of the debtor under oath in summary proceedings.<sup>89</sup> It also would be advisable to vest the assignee, like the bankruptcy trustee,<sup>90</sup> with power to examine creditors, suspected transferees, and other third parties.<sup>91</sup>

Aside from actual fraud, an estate may also be depleted by the creation of a preference or lien before the assignee takes possession. Alert creditors may have tied up the property, with or without the consent of the debtor, by mortgage, payment, or execution in aid of a judgment, prior to the making of the assignment. Since at common law the assignee is powerless to avoid these priorities, eight states wisely follow the bankruptcy rule<sup>92</sup> and destroy

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Norfolk v. Spandorfer, 160 Va. 826, 170 S. E. 12 (1933) with *In re Pellegrini*, 248 App. Div. 526, 290 N. Y. Supp. 774 (2d dep't 1936). As to the validity of an unrecorded conditional sale against a common law assignee, compare *International Harvester Co. v. Poduska*, 211 Iowa 892, 232 N. W. 67, 71 A. L. R. 973 (1930) with *Seattle Ass'n of Credit Men v. University Chevrolet Co.*, 181 Wash. 390, 43 P. (2d) 46 (1935).

87. *In re Wilson*, 138 Iowa 225, 114 N. W. 551 (1903).

Under these statutes, the title to the fraudulently conveyed property vests exclusively in the assignee immediately upon the execution of the assignment. WIS. LAWS (1937) c. 431 § 128:19. All pending suits by creditors to set aside the unlawful transfers are abated by the assignment, and the assignee substituted as plaintiff. NEB. COMP. STAT. (1929) § 130.

88. *E.g.*, KY. STAT. (Carroll, 1936) § 84. The creditor must first make a demand upon the assignee that the latter conduct the suit. *Tipton's Adm'x v. Ball*, 256 Ky. 816, 77 S. W. (2d) 50 (1934).

89. ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 185; COLO. COMP. LAWS (1921) § 6262; IND. STAT. ANN. (Burns, 1933) § 17-116; IOWA CODE (1935) § 12733; KAN. GEN. STAT. ANN. (1935) § 1322; KY. STAT. (Carroll, 1936) § 83; NEB. COMP. STAT. (1929) § 6-134; N. Y. DEBTOR & CREDITOR LAW, art. 2 § 16; TEX. ANN. REV. CIV. STAT. (Vernon, 1925) art. 272; UTAH REV. STAT. ANN. (1933) § 5-0-13; W. VA. CODE ANN. (Michie, 1937) § 3946(14); WIS. LAWS (1937) c. 431 § 128:16.

90. Bankruptcy Act, § 21a, 30 STAT. 552 (1898), 11 U. S. C. § 44(a) (1934).

91. Some statutes already permit such examination. IND. STAT. ANN. (Burns, 1933) § 17-166; KAN. GEN. STAT. ANN. (1935) § 1322; KY. STAT. (Carroll, 1936) § 83; TEX. ANN. REV. CIV. STAT. (Vernon, 1925) art. 272. But the usual rule is to the contrary. *In re Miller*, 144 Wash. 202, 257 Pac. 392 (1927).

Arizona and Nebraska have adopted the further precaution of declaring that an assignor who fraudulently conveys or conceals assets is guilty of a felony. ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 186; NEB. COMP. STAT. (1929) § 6-145.

92. Bankruptcy Act, § 67, 30 STAT. 564 (1898), 11 U. S. C. § 107 (1934).

such preferences and liens, varying the time period from one to four months.<sup>93</sup> The assignee is given authority to bring suit for recovery of the property.

The assignee's powers may also be insufficient to allow him to liquidate the assets of the estate advantageously. When the validity or amount of a claim of the estate is in dispute, the assignee, like any other litigant, must weigh the risk and expense of a lawsuit against the advantages of a proffered settlement. Since there is doubt as to the power of a common law assignee to compromise claims,<sup>94</sup> it would be desirable to grant him express statutory authority. While in some states the ability to compromise is made subject to the approval of the court,<sup>95</sup> such a provision provokes delay. And since sufficient precautions can be taken to secure a competent and bonded assignee, his powers of negotiation should not be hampered by making it impossible for him to offer definite terms.<sup>96</sup>

When all the property has been reduced to the possession of the assignee, it must rapidly be converted into cash, for otherwise mounting administrative expenses will consume a substantial portion of the proceeds. But quick liquidation is usually impeded by statutes which require notice to creditors of all sales, and the consent of the court and public bidding for each disposition.<sup>97</sup> These provisions may tend to forestall fraudulent conveyances, but only at the cost of impairing the efficiency of honest sales. Such safeguards are superfluous when the assignee is trustworthy,<sup>98</sup> and when assignees are unscrupulous they are rarely permitted to go so far as liquidation and sale before removal by vote of creditors or by a petition in bankruptcy.<sup>99</sup> Since the assignee is generally required to post a bond of double the value of the assigned estate and can be made to account to the court before he is discharged,<sup>100</sup> creditors would lose little by the elimination of these cumber-

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93. NEB. COMP. STAT. (1929) § 6-143 (1 mo.); N. J. REV. STAT. (1937) § 2:34-2 (2 mo.); N. C. CODE ANN. (Michie, 1935) § 1611 (4 mo.); PA. STAT. ANN. (Purdon, 1930) tit. 39 § 71 (4 mo.); R. I. GEN. LAWS (1923) § 5896; S. C. CODE (1932) § 9107 (3 mo.); TENN. CODE ANN. (Williams, 1934) § 7788 (3 mo.); WIS. LAWS (1937) § 128:07 (4 mo.). Wisconsin has copied the bankruptcy rule word for word.

94. See *Taylor v. Globe & Rutgers Fire Ins. Co.*, 14 Tenn. App. 538 (1931). But *cf. Champion v. Commonwealth*, 228 Ky. 794, 15 S. W. (2d) 1003 (1929).

95. KY. STAT. (Carroll, 1936) § 94; MO. STAT. ANN. (Vernon, 1932) § 5668; N. M. STAT. ANN. (Courtright, 1929) § 7-151; OHIO GEN. CODE ANN. (Page, 1926) § 11120.

96. No specific court approval is necessary in several states. NEB. COMP. STAT. (1929) § 6-138; N. J. REV. STAT. (1937) § 2:34-14; PA. STAT. ANN. (Purdon, 1930) tit. 39 § 76. *Cf. W. Va. Code Ann.* (Michie, 1937) § 3946 (9). For a similar suggestion in bankruptcy practice see *Comment* (1937) 46 YALE L. J. 1177, 1202, n. 158.

97. See, *e.g.*, KAN. GEN. STAT. ANN. (1935) § 60-1334; IOWA CODE (1935) § 12743; MO. STAT. ANN. (Vernon, 1932) § 5659; N. Y. DEBTOR & CREDITOR LAW, art 2, §§ 12, 19.

98. Adjustment bureaus liquidate over \$20,000,000 of assets per year, with negligible court control. STRENGTHENING OF PROCEDURE, *op. cit. supra* note 4, at 68.

99. See pp. 953, 949 *supra*.

100. See p. 954 *supra*.

some requirements.<sup>101</sup> Should outright repeal be thought undesirable, it might be provided that a majority of creditors, when satisfied with the assignee, could file a written waiver of all requirements as to publicity, notice, and court consent.<sup>102</sup>

### WINDING UP OF THE ESTATE

*Distribution of Dividends.* The ultimate objective for creditors is the receipt of their share in the assets of the debtor. While most of the problems encountered in payment of dividends center about the same conflict between the necessity for rapid liquidation and the cumbersome control which must be imposed upon the assignee in order to safeguard the general body of creditors, still a third complicating consideration—fairness to *individual creditors*—appears in connection with the filing and allowance of claims against the assigned estate. In order to wind up an estate expeditiously, some time limit for filing claims must be set.<sup>103</sup> But the common law assignment may not be able to move swiftly except where creditors are in substantial agreement and none of the asserted debts are in dispute, for at least one court has invalidated as unduly coercive a stipulation in a common law assignment that all claims not submitted before a certain bar date would be void.<sup>104</sup>

Statutes require that claims must be detailed, under oath, and accompanied by all evidence of the debt.<sup>105</sup> The time period varies from one to twelve months,<sup>106</sup> but many states permit late creditors to come in afterwards upon motion to the court.<sup>107</sup> Others firmly adopt the bankruptcy rule,<sup>108</sup> denying any relief to the dilatory, and permitting the assignee to allow claims and commence distribution of dividends as soon as the time limit has passed.<sup>109</sup>

101. Cf. FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) § 6757. Compare the bankruptcy recommendations made in DONOVAN, *op. cit. supra* note 5, at 32.

102. Cf. COLO. COMP. LAWS (1921) § 6266; NEB. COMP. STAT. (1929) § 6-120. The Chandler bill contains a similar provision. Comment (1937) 46 YALE L. J. 1177, 1202.

In West Virginia, a sale of property at a price less than 75% of its appraised value is subject to the summary authorization of a "commissioner of accounts," who is charged with all administrative duties which are usually handled by the court in other states. W. VA. CODE ANN. (Michie, 1937) § 3946(9).

103. See, e.g., N. Y. DEBTOR & CREDITOR LAW, Art. 2, § 5. Generally, notice of the time for filing claims must be given.

104. Turner v. Dress Hardware & Furniture Co., 207 Mo. App. 557, 227 S. W. 1035 (1921).

105. See, e.g., W. VA. CODE ANN. (Michie, 1937) § 3946(6); WIS. LAWS (1937) c. 431, § 128:14.

106. Compare NEB. COMP. STAT. (1929) § 6-116, with ALA. CODE ANN. (Michie, 1928) § 10398.

107. See, e.g., N. J. REV. STAT. (1937) § 2:34; OHIO GEN. CODE (Page, 1926) § 11134.

108. Bankruptcy Act, § 57n.

109. See, e.g., MICH. COMP. LAWS (1929) § 13608; W. VA. CODE ANN. (Michie, 1937) § 3946(6).



But since the bar date in many states is within four months of the execution of the assignments, forestalled creditors may obtain their revenge by immediately petitioning the debtor and the assigned estate into bankruptcy. It might be advisable, despite the delay, to extend the time for filing claims beyond the critical period when bankruptcy proceedings threaten.

The procedure for allowing claims is fairly uniform, and somewhat similar to the bankruptcy system.<sup>110</sup> Preliminary decisions are usually made by the assignee, subject to review in court, where any creditor may object to the allowance or disallowance of particular items.<sup>111</sup> The losing party may then appeal.<sup>112</sup> It is the red tape and cost of such proceedings which have to a large extent fostered the growth and judicial toleration of assignments made outside the statute. While it may not be possible to eliminate entirely the time-consuming judicial review, in order to expedite the process, additional burdens should be placed upon the appealing creditor. The decision of the assignee should be declared final unless the aggrieved claimant filed notice of appeal within ten days and posted a bond to cover costs.<sup>113</sup> The court should then decide the dispute in a summary manner. And since there would be no constitutional difficulty in denying an appeal from the judgment of the district court,<sup>114</sup> a provision to that effect would be salutary. Increase in dividends accruing from elimination of delay would more than compensate for any possible injustice to individual creditors.<sup>115</sup>

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For a holding that a claim is invalid if filed with the clerk of court instead of with the assignee (as required by statute), see *In re Lounsberry*, 208 Iowa 596, 226 N. W. 140 (1929).

110. Bankruptcy Act, Chapter IV. The new West Virginia procedure is most analogous to the bankruptcy method of hearings before a referee. In that state, a "Commissioner of accounts" presides and allows claims, with the customary appeal to the court. W. VA. CODE ANN. (Michie, 1937) § 3946(6) (13).

111. See, e.g., KAN. GEN. STAT. ANN. (1935) §§ 60-1324, 5, 6; TEX. ANN. REV. CIV. STAT. (Vernon, 1925) art. 269.

112. NEB. COMP. STAT. (1929) § 6-119.

113. Compare N. J. REV. STAT. (1937) § 2:34-52; WIS. LAWS (1937) § 128:15.

114. *Reetz v. Michigan*, 188 U. S. 505 (1903); *Dohaney v. Rogers*, 281 U. S. 362 (1930).

115. The substantive law of allowability of claims closely parallels bankruptcy doctrine. A debt incurred by the assignor after execution of the assignment is not provable against the assigned estate. *Langford v. State Bank of Harrodsburg*, 251 Ky. 633, 65 S. W. (2d) 730 (1933). Nor does a lienholder who files a claim with the assignee thereby lose his lien. *West Hudson County Trust Co. v. Wichner*, 121 N. J. Eq. 157, 187 Atl. 549 (Ch. 1936). See generally Legis. (1932) 20 VA. L. REV. 222. For a suggestion that state rules of allowability must agree with bankruptcy law, see *In re Brock*, 312 Pa. 7, 166 Atl. 778 (1933).

Before dividends can be distributed, rent and other charges incurred during the administration of the estate must be paid off as prior liens upon the assets, as in bankruptcy. *Armstrong v. Lone Star Refining Co.*, 20 F. (2d) 625 (C. C. A. 8th, 1927). Statutes regulate the order of distribution, usually giving priority to taxes and wage claims. WIS. LAWS (1937) c. 431 § 128:17(1).

*Discharge of the Debtor.* While the creditor's interest in an assignment focuses on the dividends he is to receive, the debtor's main purpose is to secure a release from his obligations.<sup>116</sup> It is not seriously disputed today that a debtor who makes an honest assignment of all his property should be discharged from all his debts. Yet under present statute and case law there is no way in which he may be released except with the express consent of every creditor. Assignments often end with the debtor's filing a voluntary petition in bankruptcy in order to obtain a complete discharge, when the purpose of the friendly adjustment was to avoid the necessity of bankruptcy in the first place.<sup>117</sup> State statutes are today powerless to grant a complete release, for reasons which are explicable only in the light of the history of insolvency legislation.

Prior to 1898, a federal bankruptcy act existed only during sporadic intervals, and never for more than eleven years at a time.<sup>118</sup> The great majority of debtors' estates were handled by state courts pursuant to comprehensive insolvency statutes. These enactments provided for voluntary and involuntary liquidation, and for discharge of the debtor. Often embodied in the same chapter of laws were statutes regulating assignments, to which the discharge provisions were equally applicable.<sup>119</sup> The National Bankruptcy Act of 1898 was deemed to sweep away the conflicting provisions<sup>120</sup> of all such local laws,<sup>121</sup> and there were many state courts which held that the supervening federal power to legislate concerning insolvency was so pervasive as to destroy the assignment statutes as well,<sup>122</sup> especially when these acts provided for a release.<sup>123</sup> The Supreme Court did not go so far, but decided that while the balance of the assignment laws were still in force, the discharge provisions were suspended.<sup>124</sup> Though it was conceded that

116. Some statutes also preserve to the debtor certain exemptions when he executes his assignment. See, e.g., N. Y. DEBTOR & CREDITOR LAW, art. 2 § 4.

117. See STRENGTHENING OF PROCEDURE, *op. cit. supra* note 4, at 72.

118. See *Hearings before the Committee on the Judiciary on H. R. 6439*, 75th Cong., 1st Sess. (1937) 8-16.

119. See, e.g., PA. STAT. ANN. (Purdon, 1930) tit. 39; WIS. STAT. (1935) § 128.

120. "Both [state and federal statutes] cannot go on together, without direct and positive collision; and the moment that the bankrupt act does or may operate upon the person or the case, that moment it virtually supersedes all state legislation." Story, J. in *Ex parte Eames*, Fed. Cas. No. 4, 237 (C. C. D. Mass. 1842).

121. *Sturges v. Crowninshield*, 4 Wheat. 122 (U. S. 1819); *Stellwagen v. Clum*, 245 U. S. 605 (1918).

122. *Harbaugh v. Costello*, 184 Ill. 110, 56 N. E. 363 (1900); *Cadwallader v. Shaw*, 127 Me. 172, 142 Atl. 580 (1928).

123. *Rowe v. Page*, 54 N. H. 190 (1874); *Pelton v. Sheridan*, 74 Ore. 176, 144 Pac. 410 (1914). See Williston, *Effect of National Bankruptcy Law on State Laws* (1909) 22 HARV. L. REV. 547 (1909).

124. *Pobreslo v. Boyd*, 287 U. S. 518 (1933), which expressly approved *In re Tarnowski*, 191 Wis. 279, 210 N. W. 836 (1926). See also *Packer v. Lehnner*, 115 N. J. L. 346, 180 Atl. 407 (Sup. Ct., 1935).

the state could regulate the common law privilege of making an assignment, a release from all debts was said to be the essence of a bankruptcy act, and the statutory discharge was deemed to transform the regulation into an invasion of the federal power.

A common law assignor can attempt to secure a discharge through his own efforts by providing in the assignment document that no creditor is to share in the assigned estate unless he files a release for the unpaid balance. When it is further provided that after distribution to releasing creditors the remainder of the estate is to be returned to the debtor, such an instrument is usually declared fraudulent as to dissenters.<sup>125</sup> But if the assignor relinquishes all interest, and the residue is to be shared by the non-consenters, a majority of courts will uphold the assignment.<sup>126</sup> Since the preferential feature is valid at common law, and the discharge provision rests safely upon a contractual foundation, a statute<sup>127</sup> authorizing the debtor to execute such an instrument would clearly be unobjectionable.<sup>128</sup> And while a state act which released the assignor from debts owed to non-consenters would apparently be invalid, the limitation may be unimportant. The great majority of assignments made today contain a discharge clause usually unobjected to by creditors.<sup>129</sup> A dissenter's only immediate revenge would be to throw the estate into bankruptcy, where his dividends would probably be smaller, while the debtor would still be entitled to his release.

125. *Brekke v. Crewe*, 43 S. D. 106, 178 N. W. 146 (1920); *Barrett & Co. v. Chilton*, 304 Mo. 679, 264 S. W. 802 (1924).

126. *Beal Burrow Dry Goods Co. v. Baker*, 136 Okla. 278, 277 Pac. 585 (1929); *Isaacson v. Davis*, 127 Me. 398, 143 Atl. 788 (1928); *First State Bank v. Allen*, 151 Va. 93, 144 S. E. 474 (1928).

127. Such statutes exist in four states. ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 178; S. C. CODE (1932) § 9106; VA. CODE ANN. (Michie, 1936) § 5278d. Compare PA. STAT. ANN. (Purdon, 1930) tit. 39, § 100, with tit. 39 § 164, and annotations thereunder. That the Pennsylvania discharge provision is still in force, see *In re McElwain*, 296 Fed. 112 (C. C. A. 3d, 1924); *Fidelity Trust Co. v. Union Nat. Bank*, 313 Pa. 467, 169 Atl. 209 (1933), *cert. denied*, 291 U. S. 680 (1934).

128. The Texas statute [TEX. ANN. REV. CIV. STAT. (Vernon, 1925) art 263] automatically reads a release as to consenting creditors into every assignment. While the Texas courts have suspended this provision, they have at the same time permitted the debtor himself to insert such a discharge clause into the assignment document, and have barred dissenters from relief. *Hajek & Simicek v. Luck*, 96 Tex. 517, 74 S. W. 305 (1903). This attitude has recently been approved by the United States Supreme Court, in an opinion which indicates that local interpretation of assignment statutes will hereafter be followed by the federal courts. *Johnson v. Star*, 287 U. S. 527 (1933), (1933) 42 YALE L. J. 1140.

The Virginia and Pennsylvania discharge statutes [*supra* note 127] have been upheld. See *Fugate v. Allen*, 153 Va. 143, 149 S. E. 501 (1929); *In re McElwain*, 296 Fed. 112 (C. C. A. 3d, 1924).

129. Communications to the YALE LAW JOURNAL from forty-three adjustment bureaus located throughout the country, January 14-February 10, 1938.

## CONCLUSION

A model statute should not place too many restraints upon the assignee, lest the greatest advantages of the friendly adjustment method be destroyed. The power to put the debtor into bankruptcy is a sufficient and indeed the only practical safeguard against fraud, for most of the statutory provisions aimed at preventing dishonesty necessarily increase both the scope of judicial supervision and the time and money consumed by the assignment. Too close court control resulted in defeat of the Hastings-Michener bill,<sup>130</sup> which contained a compulsory requirement that the assignee account. A similar criticism may be levied at the pending Chandler bill.<sup>131</sup> A statute which eliminated the accounting requirement and reduced court control to a minimum might fare better, although years of experience with cumbersome and expensive local statutes have conditioned the advocates of friendly adjustment to a firm distrust of additional legislation. There would still remain considerable room for improving the assignment statute by freeing the assignee from onerous burdens and by vesting him with necessary powers. The lines which such revision should take are outlined more fully below.

If statutory changes are desired, it may be questioned whether national or local legislation would be the preferable alternative. A federal statute would provide the advantages of uniformity, a competent judicial personnel trained in the handling of bankruptcy cases, and the rounding out of a single nationwide system of insolvency administration. One national bill might be easier to pass than forty-eight state laws. Most important, Congressional action alone could provide a complete discharge for the debtor, and prevent assignments from being thrown into bankruptcy.

On the other hand, uniformity is not essential except from an artistic point of view, for assigned estates are small and concentrated, and conflict of laws problems seldom arise.<sup>132</sup> Since the object of an assignment is to avoid judicial proceedings, the debatable superiority of the federal personnel would not be too important. Incorporation of an assignment statute in the bankruptcy act would automatically suspend state laws, and the inaccessibility of federal courts in the larger western districts would make their supervision of small estates too slow and costly. Furthermore local legislation has made much headway during the past two years. The newly revised statutes of Arizona, Virginia, West Virginia and Wisconsin,<sup>133</sup> which incorporate many of the changes suggested in this discussion, are extensively used by the local adjustment bureaus, with marked success. And, as has been demonstrated above, a complete statutory discharge is probably unnecessary, unless creditors are unusually stubborn.

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130. See *STRENGTHENING OF PROCEDURE*, *op. cit.* *supra* note 4, at 68.

131. See Comment (1937) 46 *YALE L. J.* 1177, 1189.

132. No more than half a dozen cases have reached the digests in the last twenty years.

133. See note 14, *supra*.

Yet while other advantages of the two systems may cancel out, state statutes cannot prevent an assignment from being an act of bankruptcy. The ever-constant danger of a bankruptcy petition has been referred to in connection with almost every problem involved in the operation of an assignment. But if a federal amendment limited bankruptcy jurisdiction to those cases where it is desired by a majority of creditors,<sup>134</sup> supplementary reform could be achieved equally well by either national or state legislation.

A suggested enactment should include eleven cardinal points:

1. All assignments should be filed with the court, and notice thereof sent to all creditors. An unfiled assignment would not be void, but any creditor could summarily force the assignee to comply with the statute.

2. Minimum qualifications should be established for the selection of a bonded assignee, and creditors should be permitted to remove the debtor's choice and appoint another.

3. The assignee should be given the power to set aside all fraudulent conveyances which creditors can now avoid.

4. All mortgages, payments and other preferences and liens obtained within four months of the assignment should be void, and the assignee should be permitted to restore the property to the general estate.

5. The assignee should be permitted to examine the debtor and all other interested parties under oath.

6. The assignee should be allowed to compromise disputes involving rights of the estate.

7. The assignee should be given full discretionary powers of sale, except perhaps when a major disposition is to be made.

8. A majority of creditors in number and amount should be permitted to authorize a composition and continuation of the business.

9. All claims against the estate should be invalid unless filed before a bar date. The assignee should then be permitted to pass upon claims, subject to the review of the district court, from whose decision no appeal would be allowed.

10. The assignee should not be required to account to the court except upon petition of a creditor.

11. The debtor should be allowed to contract for an automatic discharge from further liability to all creditors who have participated in the assignment.

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134. See p. 950, *supra*.